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OCA 0970-88

ACTION

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
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SUSPENSE 8 APR 88
Date

Action Officer: [redacted]

Remarks: Action completed 8 Apr. 88 per copy with changes sent to Annette Kjoner. OCA # 88-1114

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Name/Date

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

March 31, 1988

LEGISLATIVE REFERRAL MEMORANDUM OCA FILE 168

TO: Legislative Liaison Officer -

Department of State (Bachrach 647-4463)	25
Department of the Treasury (Carro 566-8523)	28
Department of Commerce (Levitt 377-3151)	04
United States Trade Representative (Parker 3432)	23
Export-Import Bank (Record 566-8967)	36
Arms Control and Disarmament Agency (Staples 647-8478)	34
Department of Defense (Brick 697-1305)	06
National Security Council	
Central Intelligence Agency	

SUBJECT: Justice draft report on H.R. 3651, "Antiterrorism and Arms Export Amendments Act of 1987."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than

FRIDAY, APRIL 8, 1988.

Questions should be referred to **Sue Thau/Annette Rooney** (395-7300), the legislative analyst in this office.

Ronald K. Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: J. Eisenhour E. Hays
R. Neely
A. Burman

SPECIAL

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Dante B. Fascell
Chairman
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice with respect to certain constitutional issues raised by H.R. 3651, the "Antiterrorism and Arms Export Amendments Act of 1987." The Department of Justice is concerned that the legislation, as currently drafted, is subject to interpretations that would unconstitutionally curtail the President's authority to conduct the foreign relations of the United States. Accordingly, unless the bill is amended so as to foreclose such interpretations, the Department will recommend disapproval.

We understand that three of the Committee's subcommittees have already received testimony on this bill from Allen Holmes, the Assistant Secretary of State for Politico-Military Affairs, as well as others in the Administration; accordingly, we will discuss primarily those provisions that give rise to constitutional concerns.

The bill would amend Section 40 of the Arms Export Control Act, 22 U.S.C. 2780, to prohibit the United States from exporting munitions items to countries that, as determined by the Secretary of State, support international terrorism. Similarly, the United States would be prohibited from providing financial assistance for the acquisition of munitions items by any such country, consenting to or providing a license for the transfer of munitions items to any such country, or "[o]therwise participating directly or indirectly in, or tak[ing] any action to facilitate, the acquisition of any munition items by such country." Similar prohibitions would apply to United States residents and corporations, and foreign subsidiaries controlled by a domestic concern.

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These prohibitions would be subject to waiver by the President in certain circumstances. (Section 2.)[1]

Many of the prohibitions contained in the bill are cast in imprecise or undefined terms. For example, the United States may not "directly or indirectly" provide munitions items to a listed country, nor may it "participat[e] directly or indirectly in, or take any action to facilitate, the acquisition of any munitions item by such country." (Section 2.) Similarly, the United States may not "assist in the transfer of any munitions item . . . directly or indirectly" without following certain procedures for the notification of Congress. (Section 8.) Terms such as "directly or indirectly," "assist," "participating" and "tak[ing] any action to facilitate" could be interpreted to prohibit, for example, consultation between the United States and one of its allies regarding transfers of munitions items the ally may wish to make. Any such limitation on the President's authority to discuss certain issues with foreign governments, or to recommend or concur in courses of action taken by our allies, would pose grave constitutional problems. The risk of such an interpretation is particularly great where, as here, nonspecific terms are combined with the exceptionally broad definition of "munitions item" in Section 2 (which appears to include items of foreign manufacture that are never shipped into or through the United States).

The courts have long recognized that the President possesses inherent power, derived from the Constitution, to exercise great discretion in managing the external relations of the country. As the Supreme Court stated in United States v. Curtiss-Wright Export Corp., "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. 304, 319-20 (1936). Congress, to be sure, has the power to regulate foreign commerce and thus to prohibit entirely the shipment of arms by the United States or a United

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[1] The bill would also change procedures and standards for the issuance of arms export licenses and munitions item transfers, as set forth in the Arms Export Control Act, the Export Administration Act of 1979, and the Foreign Assistance Act of 1961. (Section 3, 4, and 6.) The United States would be prohibited from providing assistance to governments that support international terrorism, again subject to waiver by the President. (Section 5.) The President's reporting requirements to Congress under the Arms Export Control Act and the Foreign Assistance Act of 1961, as well as with respect to interagency transfers by the Department of Defense, would be changed. (Sections 7, 8 and 9.) Finally, 22 U.S.C. 1732 would be amended to specify that the President may take whatever actions, not otherwise forbidden by law, that are necessary to free American citizens wrongfully imprisoned by foreign governments.

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States citizen to a particular country.[2] Yet that power does not extend to circumscribing the President's inherent powers to articulate the foreign policy of the United States in consultations with other governments. Accordingly, we believe that the bill must be amended to make clear that it does not prohibit the President or his subordinates in the executive branch from communicating with foreign countries concerning arms transfers.

We understand that Mr. Holmes, in his testimony, expressed a variety of policy reservations about the bill. In addition, the Department wishes to note an apparent drafting error that could create a potential national security problem. Sections 2(f) and 8 of the bill would provide exemption from the prohibitions contained in the bill if the requirements of Section 662 of the Foreign Assistance Act of 1961 and Section 501 of the National Security Act of 1947 are met. Because this exemption is applicable to the transfer of "any munitions item", however, it would alter those requirements since section 501 is currently limited to transfers of defense articles exceeding $1,000,000 in value. 50 U.S.C. 415. Thus, section 8 of the bill at a minimum should be redrafted to state, "Notwithstanding the provisions of this Act, the United States may transfer or assist in the transfer of munitions items in accordance with the procedures provided under Section 662 of the Foreign Assistance Act of 1961 and Title V of the National Security Act of 1947." Such an amendment would leave unaltered the current reporting requirements for Congressional oversight of intelligence activities. Section 2(f) of the proposed bill should then be deleted.

In light of our constitutional concerns, in the absence of clarifying amendments responsive to the constitutional issues, we would recommend to the President that he disapprove the proposed legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

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[2] See Letter from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to Senator Arlen Specter at 2 (December 16, 1987).

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